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SUPREME COURT, U. S

In The

Supreme Court of the United States

October Term, 1973

No. 73-1272

G. I. DISTRIBUTORS, INC., ALVIN DRUSS, IRVING HERMAN,

Petitioners,

vs.

PATRICK MURPHY, Individually and in his Capacity as Police Commissioner of the City of New York,

FRANK S. HOGAN, Individually and in his Capacity as District Attorney of New York County,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Certain misstatements in the respondents' brief in opposition require the filing of this reply. The respondents' suggestion that the seizure of the 19,000 magazines and all of G. I. Distributors' business records constituted an "overnight quarantine" is most misleading. In reality these materials were held for over a month until the federal district court intervened and directed their return.

The "Hearing"

The belated offering of a "hearing" after the seizure was in all respects a sham. The seizure took place on January 6, a Thursday, and the matter was adjourned in the criminal court until Monday, January 10. At that time counsel did not participate in any proposed hearing as respondent suggests (Res. Brf. at 4.) On the contrary, petitioners' counsel urged that the New York Criminal Court had no jurisdiction to hear the matter. The District Attorney sought a warrant under §6330 of the New York Civil Practice Law and Rules which authorizes the destruction of any obscene material. Section 6330, however, provides that the proceeding must be brought in the state supreme court, not in the criminal court.

Although counsel argued the magazines were constitutionally protected, that position was subordinated to the complaint that the criminal court lacked jurisdiction to hear the matter — a position confirmed in *Milonas* v. *Schwalb*, 65 Misc.2d 1042, 319 N.Y.S.2d 327 (Sup. Ct., N.Y.Co., 1971). In any event the criminal court judge only examined the magazines and thereafter issued the warrant. Clearly, no valid hearing was offered petitioners.

"Fear that the Magazines Would be Spirited Away"

There was absolutely no danger that G. I. Distributors, one of New York City's largest distributors of magazines, would "spirit away" 19,000 magazines to avoid prosecution. That desperate argument made by the prosecution is preposterous. The District Attorney already had six copies of each magazine necessary for the prosecution of their felony charges.[1] Consequently, it would

[1]The New York Penal Law provides in subsection 2 of section 235.10 that, "A person who posesses six or more identical or similar obscene articles is presumed to possess them with intent to promote the same."

make no sense at all for G. I. Distributors to try to hide 19,000 magazines, assuming they could find a place to store them.

Controversy Not Academic

Although G. I. Distributors, out of an abundance of caution, returned the 19,000 magazines to the publisher after the district court injunction, the issues presented here are by no means academic. For the Second Circuit's decision has left a deep gash in the adversary hearing doctrine so essential to the uninterrupted circulation of books in a free society. Had the appropriate procedures designed by this Court been followed, the drastic restraints imposed here would have been avoided. If the court of appeals decision stands uncorrected, further excursions into the protected precincts of the first amendment are bound to occur.

Other Cases Pending Before this Court

This Court's recent grants of certiorari in *Hamling* v. *United States*, No. 73-507; *Jenkins* v. *Georgia*, No. 73-557; and *Southeastern Promotions Ltd.* v. *Conrad*, No. 73-1004, indicate the need for further regulation in this complex area of the law. Moreover, the Court, on March 18, 1974, noted probable jurisdiction in a §1983 action virtually identical to ours which involved the seizure of a motion picture film without a prior adversary hearing. *Huffman* v. *Pursue, Ltd.*, 73-296. And because this is the only case returning to the Court since its June, 1973 obscenity decisions which involves a massive seizure of books without a prior adversary hearing, it is particularly appropriate that this case be heard along with the others.

Since the adversary hearing plays such a vital role in guarding what the public will be allowed to read and see, it must constantly be refortified. Consequently, a grant of certiorari in this case will afford the Court an opportunity to galvanize that principle. If the court of appeals judgment is left undisturbed,

further official lawlessness will be sponsored and no book or magazine will be safe. For all these reasons the petition for certiorari should be granted.

Dated: Buffalo, New York
March 26, 1974

Respectfully submitted,

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